The Break In Service rules applicable in this case appear at Article I, Section R of the Pension Plan, stating in pertinent part as follows:

> For periods prior to January 1, 1976
>
> (a) Prior to first Covered Day - An employee shall be considered to have a Break In Service prior to his first Covered Day if his period of continuous employment with an employer who subsequently became a Covered Employer was broken for a period of 156 or more consecutive calendar weeks.
>
> (b) After first Covered Day - An employee shall be considered to have a Break In Service after his first Covered Day if he was not in Covered Employment for a period of 156 or more consecutive calendar weeks.

On February 4, 2000, DiGiacomo applied to the Pension Fund for a pension. On March 17, 2000, DiGiacomo's application was approved. DiGiacomo was credited with 16.78 years of contributory benefit service for his continuous Covered Employment for the period from 1979 to 1993. He was not credited with over ten years of benefit service from 1961 through 1971 because he was not in covered employment for a period of more than 156 consecutive calendar weeks, resulting in a

break in service, per the terms of the plan prior to January 1, 1976.

DiGiacomo filed an appeal of the Administrator's calculation of benefit service credit to the Pension Plan's Board of Trustees, averring that he was entitled to benefit service credit earned prior to his break in service.

DiGiacomo appeared before the Trustees' Appeal Committee on February 14, 2001. At that time he was afforded an opportunity to present any evidence and arguments he deemed relevant to this appeal, along with any documentation he wished reviewed by the Trustees. The Trustees denied DiGiacomo's Appeal in a written opinion stating the basis of their decision. The Trustees held that the first 10 ½ years of his service in covered employment was forfeited due to the Break in Service provisions of the Pension Plan.

DiGiacomo appealed the Trustees' decision to the American Arbitration Association. On October 17, 2001, an arbitration hearing was conducted. On November 1, 2001, the arbitrator denied DiGiacomo's appeal and upheld the Administrator's determination that DiGiacomo's break in service canceled his vesting and benefit service for the period from 1960 to 1971.

On March 15, 2004, DiGiacomo filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking benefit service credit for the period from 1960 to 1971 that had been forfeited by application of the Plan's Break

In Service Rules. The complaint averred that the Pension Fund violated ERISA § 202(b) and § 204(b)(1)(D) by applying the pre-ERISA break in service provisions of the plan. The Pension Fund filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). On July 29, 2004, the District Court granted the Pension Fund's motion to dismiss.

On appeal, the Third Circuit reversed and remanded the case to the District Court. On November 15, 2005, the Third Circuit denied DiGiacomo's Motion for Attorneys' Fees.

REASONS FOR GRANTING THE PETITION

One of the principal objectives of ERISA is "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). The goal of uniformity cannot be achieved when, in this instance, pension plans have varying legal obligations to participants in different parts of this country. *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001).

There is a division in the circuits with regard to whether it was the intent of Congress to read the benefit accrual provision of ERISA, 29 U.S.C. § 1054(b)(1)(D) with the vesting provision, ERISA, 29 U.S.C. § 1053(b)(1)(F) for purposes of a pre-ERISA break in service. More specifically, if the break in service forfeiture provision is contained in a pension fund's plan document, or whether the accrual section

should be read in isolation of the other ERISA provisions.

Resolving that conflict of the circuits will ensure the uniform administration of this national legislation.

I. THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING THE TREATMENT OF FORFEITED ACCRUED BENEFITS RESULTING FROM A PRE-ERISA BREAK IN SERVICE.

The issue addressed by the Third Circuit was whether Congress intended to treat accrued and vested benefits differently with respect to breaks-in-service when the break occurred prior to ERISA's effective date. App. at 10a. By the Third Circuit's own admission, the "question is a close and difficult one". App. at 12a. "Not surprisingly, then it has also led to a division in this Court, in which our dissenting colleague Judge Alito has concluded that § 203 should control this appeal. In this respect, Judge Alito has aligned himself with the result reached by the Seventh Circuit." App. at 12a. Contrastingly, the Third Circuit majority opinion aligned itself with the Second Circuit.

At the heart of this dispute is an interpretation of ERISA's break in service provisions for vesting and accrual purposes. Under § 203(b)(1)(F) of ERISA, 29 U.S.C. § 1053(b)(1)(F) of ERISA, a plan is permitted to exclude years of service that would have been disregarded under a pre-ERISA plan's break in service rules for vesting

purposes. However, there is not a parallel provision that addresses the treatment of a break in service for benefit accrual purposes. The Third Circuit errs in its reasoning that such an accrual provision is necessary.

The Third Circuit opines that because Congress did not include a similar provision in ERISA § 204, 29 U.S.C. § 1054, statutory construction dictates that pension plans must consider an employee's fully credited service once that employee has vested rights in the plan regardless of a plan's pre-ERISA break in service rules, relying on the language of 29 U.S.C. § 1054(b)(1)(D).

It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative" *Dep't of Revenue of Oregon v. ACF Industry, Inc.*, 510 U.S. 332, 341-342 (1994). The Third Circuit in *DiGiacomo* renders 29 U.S.C. § 1053(b)(1)(F) impotent by its interpretation of § 204. Therefore, its reasoning on statutory construction is flawed.

In his dissenting opinion, Judge Alito notes that accrued benefits are not unconditional. He opines that the majority incorrectly assumed that ERISA required the Plan to include all accrued benefits in the calculation of pensions, but in fact ERISA does not so provide.

> As the Supreme Court explained in *Central Laborers' Pension Fund v. Heinz*, accrual is simply 'the rate at

> which an employee earns benefits to put in his pension account.' 541 U.S. 739, 749 (2004). Accrued benefits, in other words, are like chalk marks beside the employee's name. They are conditional rights that do not become 'irrevocably his property' until they vest'. *Id.* Only then do they become 'legally enforceable against the plan.' ERISA § 3(19), 29 U.S.C. § 1002(19). Prior to vesting, accrued benefits can be, and in this case were, forfeited under the terms of a participant's plan.

App. at 22a.

Therefore, the forfeiture of the vesting benefits due to a pre-ERISA break in service, which was not in dispute, caused the conditional accrued benefits to be likewise forfeited. Judge Alito submits that including a § 203 break in service provision in the § 204 accrual provision would be superfluous, relying, in part, on the legislative history of § 204. App. at 21a. Judge Alito concluded that DiGiacomo had no right the receive the benefits that were forfeited under the plan's break in service provisions and that the district court correctly granted the Pension Fund's motion to dismiss for failure to state a claim on which relief can be granted. App. at 25a.

A. Seventh Circuit

1. *Jones v. UOP*, 16 F.3d 141(7th Cir. 1994) – In 1949 Jones obtained employment at UOP which provided for contributions by both the employer and

employee, to purchase annuities for an employee's retirement. Jones had a break in service in 1960. *Id.* at 142. He returned to employment at UOP in 1961where he worked until early retirement in 1985. *Id.* Under the terms of the pre-ERISA plan, Jones had no right to count the years between 1949 and 1960 in his pension calculation due to the break in service. *Id.* The Seventh Circuit held that § 204 should be read in conjunction with § 203, thus Jones had no right to accrual benefit calculation encompassing the earlier period of time. *Id.* at 144.

The Seventh Circuit reasoned that § 204, 29 U.S.C. § 1054 was intended to address the evils of backloading, where a severely backloaded plan would be invalidated by § 204(b)(1)(D), 29 U.S.C. § 1054(b)(1)(D). "Backloading is a distinct problem from breaks in service, and there is no indication that Congress in dealing expressly with the former problem in section 204(b)(1)(D) meant for the latter problem to be treated differently under section 204 than under section 203." *Id* at 144. The Court suggests that § 204's silence on breaks in service should not be interpreted to "defeat break in service provisions in plans adopted before ERISA". *Id.* Therefore, if a pre-ERISA plan provision has forfeiture due to a break in service for vesting purposes, the plan does not have to reinstate that same time for accrual purposes.

2. *McClain v. Retail Food Employers Joint Pension Plan*, 413 F.3d 582 (7th Cir. 2005), *cert. denied*, ____ U.S. ____ (2005) – The Seventh Circuit recently revisited this issue, reaffirming *Jones*. McClain worked for National Tea Company from

March 1957 to March 1973 and was a participant in a multi-employer pension plan during that period. McClain ceased participation in the plan for eleven years. In April 1984 he was employed by another contributing employer, participating in the same multiemployer pension plan until April 1993. *Id.* at 584. The pre-ERISA pension benefits that McClain accrued between 1957 and 1973 never vested because of his break in service. *Id.*

The Seventh Circuit defines "accrued benefits as normal retirement benefits that an employee has earned at any given time during the course of employment". *Id*, quoting *Vallone v. CNA Financial Corp.*, 375 G.3d 623, 635 n. 5 (7th Cir. 2004). Whereas, "an employee's vested benefits are the accrued benefits that the employee is actually 'entitled to keep'." *Id.* at 584.

McClain upheld the *Jones* decision, noting that "Congress did not intend § 204's silence on pre-ERISA breaks in service to 'override' the explicit rules in § 203 for addressing such breaks." *Id.* at 586. This Court denied *McClain's* Petition for Writ of Certiorari on November 28, 2005.

B. Second Circuit

McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund, 320 F.3d 151 (2nd Cir. 2003) – McDonald worked as a longshoremen periodically from 1953 to 1991. At issue was 13 years of "credited service" under the Plan from 1953 to 1969, which had been forfeited pursuant to the pre-ERISA

break in service rules of the plan in place prior to the effective date of ERISA.

The Second Circuit held that the Pension Plan could not, for accrual purposes, exclude years of service based upon the plan's break in service rules. *Id.* at 159. The Second Circuit rejected the pension plan's argument that the accrual and vesting provisions should be read in concert.

In support of its position, the pension plan referred to ERISA transitional rules to examine Congressional intent. The transition rules governed the period between the passage of ERISA in 1974 and the effective date of January 1, 1976. Specifically, the pension plan argued that ERISA § 211(e)(1)(A) and (e)(2)(A) treated accrued and vesting benefits the same and that with regard to the pre-ERISA break in service provisions, it was Congressional intent to treat accrual and vesting the same way throughout ERISA. If Congress intended to treat the two provisions differently, they would be no need to prohibit plan amendments for break in service during the transitional period for accrual purposes. *Id.* at 158.

The Second Circuit disagreed. The court opined that § 211(e)(1)(A), 29 U.S.C. § 1061(e)( )(A) was a "narrow subsection that, for the purposes of accrued benefits, merely froze the break-in-service provisions that were in effect on January 1, 1974, by allowing only those amendments during the transitional period that would bring the provisions into compliance with § 202 in advance of its effective date in 1976." *Id.*

The Second Circuit position is that in absence of explicit statutory language addressing pre-ERISA breaks in service for accrual purposes, there is no forfeiting of the accrual of pre-ERISA benefits. The Second Circuit is misguided in its analysis in that the vesting provisions determine whether benefits are forfeitable, while the accrual provisions determine the method in which the participant's account is credited. There was no need for Congress to add a second pre-ERISA break in service provision.

Due to the Circuit Court of Appeals' deeply divided interpretations of ERISA's accrual and vesting provisions, the Court's intervention is necessary.

II. THIRD CIRCUIT FAILED TO THOROUGHLY EXAMINE THE LANGUAGE, STRUCTURE AND PURPOSE OF THE VESTING AND ACCRUAL PROVISIONS IN ITS ANALYSIS

ERISA is "an intricate, comprehensive statute." *Boggs v. Boggs*, 520 U.S. 833, 840 (1997). To determine Congress' intent, the Court examines the explicit statutory language and the structure and the purpose of the statute. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). The Third Circuit's interpretation of the ERISA, downplays the interaction and interdependency of the minimum participation provision of § 202, the vesting provision of § 203 and the accrual provisions of § 204. In taking this approach, the Third Circuit's

interpretation of ERISA causes a conflict with other sections of ERISA that Congress never intended.

The fact that Congress intended that vesting and benefit accrual would function consistently becomes more apparent upon reviewing the legislative history of ERISA. The Joint Explanatory Statement of the Committee of Conference (herein "Joint Statement") is stated in full at pages 5038-5165 of the 1974 U.S. Code Cong. & Admin. News. H.R. Conf. Rep. No. 93-406 (1974) *reprinted in* 1974 U.S.C.C.A.N. 5038-5165.

The Joint Statement leaves no doubt that Congress intended uniform rules to apply to both vesting and participation credit. Under the title "Year of Service Defined" beginning at 5043, it states, "The regulations with respect to 'year of service' are to be written by the Secretary of Labor for purposes of participation and vesting. The term 'hour of service' will also be defined in Labor Department regulations." *Id.* at 5045.

Under the title, "Break in service," it states: "Other rules with respect to break in service are explained below in connection with vesting and benefit accrual." *Id.* at 5046. (Emphasis added).

The Joint Statement contains a discussion of the vesting and benefit accrual rules under the single title "Vesting and Related Rules" beginning at page 5049. Under the title, "Breaks in service," the Joint Statement provides:

> The rules with respect to breaks in service for vesting and benefit accrual purposes may be summarized as follows: For years beginning prior to the effective date of the vesting provisions, a plan may apply the break-in-service rules provided under the Plan, as in effect from time to time. However, no plan amendment made after January 1, 1974 may provide for break-in-service rules which are less beneficial to any employee than the rules established under this bill.

Id. at 5052.

After describing the three methods of benefit accrual contained in 29 U.S.C. § 1054 (b)(1), subparagraphs (A), (B) and (C), the Joint Statement provides under the title, "Benefits accrued in the past," the following: "Generally, the vesting rules of the conference substitute are to apply to all accrued benefits, including those which accrued before the effective date of the provisions (subject, however, to the break-in-service rules discussed above)." *Id.* at 5056.

The Pension Fund relies upon the authoritative explanation of a Conference Committee which crafted intricate and complex legislation, as well as statutorily mandated regulations. The legislative history on which the Pension Fund relies is clear and consistent with the plain wording of the ERISA statute. The legislative record demonstrates that Congress intended that the

break-in-service requirements applicable to vesting and benefit accrual would function consistently both directly and through cross-referencing provisions.

As described by Senator Harrison Williams, in the vesting and accrual benefit provisions of the conference bill, "It is to be noted that under the conference substitute, upon the effective date of these provisions, workers will generally be entitled to have their service prior to the effective date counted, both for purposes of determining their place on the applicable vesting schedule and for calculating the years of accrued benefits to be vested. Such entitlement will be subject to applicable break-in-service rules, and to condition that they have at least three years of service after December 31, 1970." 120 CONG. REC. S15737 (daily ed. August 22, 1974) (statement of Sen. Williams) (Emphasis added).

As noted in the dissenting opinion in *DiGiacomo,* "the reports on the embryonic legislation usually do not discuss accrual or, when they do, discuss it only under the rubric of vesting." App. 24a. Accrual was in essence "the handmaiden" to vesting. *Id.* The definition of accrual was required to regulate the extent of "backloading that could be permitted by a plan." *Jones*, 16 F.3d at 143-44 (7th Cir. 1994).

"The minimum vesting standards of the Code would be rendered meaningless if the plan sponsor were free to backload the plan...because mandated large percentage of nothing is still nothing." App. at 25a, *(Alito, J.,dissenting)* quoting, 1 Jeffrey D.

Mamorsky, *Employee Benefits Handbook* § 17:36 (2004).

III. CONGRESS EXPRESSLY PROVIDED FOR PROSPECTIVE APPLICATION OF ERISA'S PARTICIPATION, VESTING AND ACCRUAL REQUIREMENTS

In enacting ERISA, Congress was aware of the revolutionary changes being uniformly imposed on all private pension plans with their pre-ERISA funding standards. While enacting ERISA in 1974, Congress intentionally did not make participation, vesting and accrual provisions effective until January 1, 1976. ERISA, 29 U.S.C. § 1061(b)(2).

Congress was aware that many pre-ERISA pension plans had break-in-service rules with forfeiture provisions. Congress did not require these pension plans to restore the years of service for purposes of pension computations, recognizing it would cause a potentially huge, unforeseen and unfunded financial burden on the pension plan and its employer sponsors. Instead, Congress made ERISA prospective only, specifically providing that among the service which ERISA plans could properly disregard was:

> ...years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date;

ERISA, 29 U.S.C. § 1053(b)(1)(F).

The Third Circuit previously held that a break-in-service can forfeit credits accrued prior to the effective date of ERISA, if the break-in-service forfeiture provision is contained in a pension fund's plan document. *Tanzillo v Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140, 145 (3d Cir. 1985). In *Tanzillo,* there was a complete denial of pension benefits notwithstanding 16 years of service with an employer, prior to a pre-ERISA break in service. In *DiGiacomo,* the Third Circuit distinguishes this holding from *Tanzillo*, stating that in *Tanzillo,* the court was exclusively addressing the vesting provisions in upholding the plan's break-in-service rules. App. 11a.

ERISA, 29 U.S.C. § 1054(b)(1) requires that pension plans use one of three accrual methods for calculating benefits in order to prohibit the pre-ERISA practice of providing greater benefit credits in the later years of an employee's years of service, otherwise known as backloading. The three accrual methods are described in 29 U.S.C. § 1054(b)(1), subparagraphs (A) known as the "3-Percent Method, (B) known as the "133-1/3 Percent Rule and (C) known as the "Fractional Rule."

The only purpose of ERISA, 29 U.S.C. § 1054(b)(1)(D) is to provide the pre-ERISA plans with a transitional rule instructing those plans with backloading provisions to begin to accrue benefits for pre-ERISA service. It permits the benefit accrual for pre-ERISA years of participation at one-half the rate permitted by the three alternative methods in subparagraphs (A),(B) and (C), or at the rate allowed for in the pre-ERISA plan, if greater. In essence, §

204(b)(1)(D) was addressing the complex backloading problem rather than a pre-ERISA break in service issue. There was not a need for a duplicate provision in § 204, in that Congress had addressed pre-ERISA break in service in § 203(b)(1)(F).

Under § 203(b)(1)(F), 29 U.S.C. § 1053(b)(1)(F) of ERISA, a plan is permitted to exclude years of service that would have been disregarded under a pre-ERISA plan's break in service rules for vesting purposes.

> § 1053 Minimum vesting standards
>
> (b) Computation of period of service
>
> (1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:
>
> * * *
>
> (F) years of service before the part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date;

ERISA, § 203, 29 U.S.C. § 1053

The Third Circuit in *DiGiacomo* held that because Congress did not include a similar provision in ERISA § 204, it evidences that pension plans must consider all of an employee's service once that employee has vested rights in the plan regardless of the plan's pre-ERISA break in service rules. The Third Circuit relies on language under 29 U.S.C. § 1054(b)(1)(D). App. 17a.

However, 29 U.S.C. § 1054(b)(1)(D) does not require the restoration of forfeited pre-ERISA service for benefit accrual purposes. The purpose of Subparagraph D is to regulate the accrual rate as to a workers' "years of participation" defined in 29 U.S.C. § 1054(b)(4)(A). ERISA § 204(b)(4)(A), references 29 U.S.C. § 1052(b), which addresses the minimum participation standards.

"Years of participation" for determining employee accrued benefits is a period of service, beginning at the earliest date on which the employee is a participant in the plan and which is included in a period of service required to be taken into account under § 202(b), 29 U.S.C. § 1052(b) as determined by the Secretary of Labor which provide for the calculation of such period on any reasonable and consistent basis.

Regulations promulgated by the Secretary of Labor include a specific section relating to "years of participation" prior to the effective date of ERISA. *See* 29 C.F.R. § 2530.204-2(b).

> (b) *Participation Prior to the Effective Date.* For purposes of applying the accrual rules of Section 204(b)(1)(D) of the Act and Section 411(b)(1)(D) of the Code relating to accrual requirements for defined benefit plans for periods prior to the effective date of the Sections), all service from the date of participation in the plan as determined in accordance with the applicable plan provision, shall be taken into account in determining an employee's period of service.

29 C.F.R. § 2530.204-2(b).

This regulation protects a pre-ERISA break in service provision as long as it was incorporated in the terms of the pension plan. Moreover, § 202(b)(2) and (3), 29 U.S.C. § 1052(b)(2) and (3), explicitly reference the break-in-service provisions contained in 29 U.S.C. § 1053(b)(3)(A), indicating an interplay among minimum participation, vesting and accrual sections. The statutory and regulatory provisions reflect that the application of § 203 and § 204 of ERISA should be consistent with regard to a pre-ERISA break-in-service.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PRECEDENTIAL

[ENTERED: AUGUST 24, 2005]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-3510

ALFRED DIGIACOMO,

Appellant,

v.

TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY,

Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civil Action No. 04-1090)
District Judge: Honorable Legrome D. Davis

Argued: Friday, May 27, 2005

Before: SCIRICA, *Chief Judge*, ALITO and
GARTH, *Circuit Judges*

(Opinion Filed: August 24, 2005)

OPINION OF THE COURT

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Garth, *Circuit Judge*:

Alfred DiGiacomo was a member of the Teamsters Union and a participant in the Teamsters Pension Trust Fund of Philadelphia and Vicinity (the "Fund") (the appellee here). In computing DiGiacomo's accrued pension benefits, the Fund disregarded some 10.5 years of his service time rendered prior to the passage of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. In so doing, the Fund relied on certain break-in-service provisions in its governing pension plan, which explicitly permitted

the Fund to exclude DiGiacomo's pre-ERISA service time accrued prior to his break-in-service, as defined in the plan. DiGiacomo thereupon brought this ERISA action against the Fund, alleging that it incorrectly computed his accrued benefits by refusing to aggregate his pre-break and post-break service time.

The District Court granted the Fund's motion to dismiss, holding that ERISA permitted the Fund to disregard DiGiacomo's service time preceding his break-in-service, which occurred before ERISA's effective date of January 1, 1976. We will reverse and remand to the District Court for further proceedings.

I.

The material facts underlying this appeal are straightforward and uncontested. From 1960 to 1971, DiGiacomo earned a total of 10.5 years of benefit service for "covered employment," which is defined in the Teamsters Pension Plan of Philadelphia and Vicinity, Amended and Restated, effective June 1997 (the "Plan"), as "any employment in a bargaining unit in a capacity for which Employer Contributions on behalf of an Employee are payable to the Trust Fund in accordance with the terms of a collective bargaining agreement with the Union." For the next five years, between 1972 and 1977, DiGiacomo worked outside covered employment and did not return to covered employment until some time in 1978. Upon returning to covered employment in 1978, he earned

approximately eighteen years of additional benefit service.

DiGiacomo applied to the Fund for pension benefits on February 4, 2000. The Fund Administrator approved his application on March 17, 2000, crediting him with the appropriate amount of service time for his post-1978 employment.[1] The Fund, however, determined that the benefit service DiGiacomo earned between 1960 and 1971 was forfeited pursuant to the express provisions of the Plan.[2] DiGiacomo had incurred a break-in-service, as defined in the Plan, upon leaving covered employment from 1972 to 1977. As a result, the Fund was not required under the express provisions of the Plan to aggregate DiGiacomo's years of service credited before he incurred the break-in-service (from 1972-1977) in determining his accrued pension benefit. *See* Plan Article I, Section S.3(a).[3]

---

[1] The record reveals that the Fund credited DiGiacomo with 1 18 years of vesting service and 16.8 years of contributory benefit service. On April 24, 2003, the Fund adjusted the credits to 20 years of vesting service and 18.81 years of benefit service.

[2] In his appellate brief, DiGiacomo asserts that "the Fund 2 credited him with 10.5 years of service for purposes of accrual and vesting." App. Br. at 2. On this appeal, we decide only the issue presented to us – whether the 10.5 years of pre-break service must be included in the calculation of DiGiacomo's accrued benefit.

[3] The Plan provided, in pertinent part:

3. Years of Benefit Service shall be aggregated, except in the following situations:

After appealing to the appropriate administrative tribunals, and thereby exhausting his administrative remedies, DiGiacomo filed the present action in federal court.[4]

II.

The question we have to decide is whether, for accrual of benefit purposes, ERISA prevents pension plans from denying credit for pre-ERISA service time accrued prior to a break-inservice. DiGiacomo argues that ERISA (under § 204) trumps the Plan's break-in-service provisions, thus requiring the Fund to aggregate his pre-break and post-break service in determining his accrued benefit. The Fund contends that ERISA does not override a pre-ERISA plan's break-in-service provisions, but rather permits the Fund (under § 203) to deny DiGiacomo credit for 10.5 years of his pre-break service. Whereas

---

> (a) Benefit Service credited before an Employee's most recent Break in Service shall be forfeited.

Plan, Article I, Section S.3(a).

[4] The District Court had subject matter jurisdiction over this case pursuant to § 502(e) of ERISA, 29 U.S.C. § 1132(e). We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

As this Court is reviewing the District Court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim, the standard of review is plenary. *Unger v. Nat'l Residents Matching Program*, 928 F.2d 1392, 1394 (3d Cir. 1991). In addition, all facts alleged in the complaint and all reasonable inferences that can be drawn from them must be accepted as true. *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990).

DiGiacomo relies on Section 204 of ERISA, 29 U.S.C. § 1054, which governs the accrual of benefits, the Fund relies on Section 203 of ERISA, 29 U.S.C. § 1053, which regulates vesting.[5]

In deciding this appeal, we must therefore examine the relationship between the vesting (§ 203) and accrual of benefit (§ 204) provisions of ERISA. As discussed more fully below, Congress in enacting these provisions has left us with a conundrum: § 203 specifically includes language permitting plans or employers to disregard pre-ERISA service time rendered before a break-in-service *with regard to vested benefits*; § 204, by contrast, contains no such language *with regard to accrued benefits*. While this appeal involves the *accrual* of benefits, as distinct from *vesting*, the Fund nonetheless urges us to read the relevant language in § 203 (allowing the disregard of service time prior to ERISA and prior to a break-in-service *for vesting purposes*) into the text of § 204 (lacking similar language *for accrual of benefit purposes*).

A.

We begin by observing that the Supreme Court, in *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 749 (2004), articulated the important distinction between *vesting* and *accrual*. Accrual, as the Supreme Court noted, is "the rate at which an

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[5] For ease of reference, throughout this opinion we will refer to the vesting provision of ERISA as § 203 rather than 29 U.S.C. § 1053, and to the accrual provision of ERISA as § 204 rather than 29 U.S.C. § 1054.

employee earns benefits to put in his pension account." *Id.* (citing 29 U.S.C. § 1054). Vesting is "the process by which an employee's already-accrued pension account becomes irrevocably his property." *Id.* (citing 29 U.S.C. § 1053 and *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 366 n.10 (1980)). Vested benefits, then, are the "nonforfeitable" subcategory of accrued benefits. 29 U.S.C. § 1002(19).[6]

ERISA § 204(b)(1)(D) provides for the accrual of benefits for pre-ERISA service based upon an employee's "years of participation" in a plan. 29 U.S.C. § 1054(b)(1)(D).[7] Moreover, § 204(b)(4) starts

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[6] 29 U.S.C. § 1002(19) provides:

> The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan . . . .

Id.

[7] This subsection states:

> Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of--

the clock for "participation" at "the earliest date on which the employee is a participant in the plan" and further notes that such participation is included in the "period of service required to be taken into account" under § 202(b).[8] As such, in calculating the credited service time for accrual purposes, the statute provides a cross-reference to § 202(b), which establishes the minimum participation standards concerning employee benefit rights. That subsection provides, with some exceptions, none of which are relevant here, "*all years of service* with the employer or employers maintaining the plan shall be taken into account in computing the period of service for

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> (i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or
>
> (ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

29 U.S.C. § 1054(b)(1)(D).

[8] Section 202(b) is cross-referenced in § 204(b)(4)(A), where it is referred to as § 1052(b), as follows:

> For purposes of determining an employee's accrued benefit, the term "year of participation" means a period of service (beginning at the earliest date on which the employee is a participant in the plan and which is included in a period of service required to be taken into account under section 1052(b) of this title, determined without regard to section 1052(b)(5) of this title) as determined under regulations prescribed by the Secretary which provide for the calculation of such period on any reasonable and consistent basis.

29 U.S.C. § 1054(b)(4)(A).

purposes of subsection (a)(1) of this section." 29 U.S.C. § 1052(b)(1) (emphasis added).

Pursuant to the plain language of the statute, the Fund was required to credit DiGiacomo with "all years of service" in computing his accrued pension benefits, including his 10.5 years of pre-break service. Nothing in § 204 of ERISA allows the Fund to apply its break-in-service provisions to the calculation of accrued benefits.

As noted, ERISA treats breaks-in-service differently for vesting purposes. ERISA § 203(b) explicitly allows pension plans to apply break-in-service provisions to the calculation of *vested benefits* arising from pre-ERISA service:

> (1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the *following may be disregarded*: .
>
> . .
>
> (F) *years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date* . . . .

29 U.S.C. § 1053(b)(1)(F) (emphasis added).

Were § 203 applicable here, the Fund would thus have express statutory warrant to disregard DiGiacomo's pre-break service time. As it is, however, ERISA § 204 is the applicable statute, and significantly, it contains no exclusion paralleling that of § 203, 29 U.S.C. § 1053(b)(1)(F), *i.e.*, permitting an exclusion for years of service before ERISA, followed by a break-in-service before ERISA.[9]

We now proceed to examine whether this difference in statutory language means, as DiGiacomo contends, that Congress intended to treat accrued and vested benefits differently respecting breaks-in-service.

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[9] In arguing that § 204 is irrelevant to this appeal, we suggest that Judge Alito has oversimplified the interplay between the vesting (§ 203) and the accrual of benefit (§ 204) provisions. He assumes that the loss of vesting credit for certain years of service necessarily and unequivocally entails the loss of accrued benefit credit for those same years of service. However, § 203(b)(1)(F) does not say that a break-in-service leads to forfeiture of *all* previously accrued benefits. Rather, the statutory scheme is somewhat more complex, providing that all "years of service" prior to the break-in-service can be disregarded in calculating the relevant period of service for *vesting* purposes. To borrow Judge Alito's helpful analogy, *see* dissenting opinion at 2, DiGiacomo's 10.5 years of accrued benefit credit might be equated to chalk marks beside the employee's name, but they are not necessarily erased merely because related marks in a separate category for vested benefit credits have been lost due to a break-in-service.

B.

We are not a *tabula rasa* in approaching this question. While we have never expressly held that Congress intended to treat vesting and accrual of benefits the same with respect to breaks-in-service, we have affirmed, without opinion, a district court decision that has so held. *See Haas & Cass v. Boeing Co.*, Civ. A. No. 90-7414, 1992 WL 221335, at *4-*7 (E.D. Pa. Sept. 4, 1992), *aff'd without opinion,* 993 F.2d 877 (3d Cir. 1993). Such an affirmance, however, has no precedential value. *See* Third Circuit Internal Operating Procedure § 5.7 (July 2002) (explaining that only our published opinions have precedential value).

We have also issued one precedential opinion addressing a similar issue. In *Tanzillo v. Local Union 617, International Brotherhood of Teamsters*, 769 F.2d 140 (3d Cir. 1985), we held that "ERISA . . . explicitly recognizes break-in-service forfeiture of . . . credits which had been accrued prior to the effective date of ERISA, if such break-in-service forfeiture is provided for in the applicable plan document." *Id.* at 145. In *Tanzillo*, though, we never dealt with § 204, but rather we relied exclusively on § 203 – the vesting section – in upholding a plan's break-inservice rules. *Id.* at 144-45. For this reason, *Tanzillo* is not controlling here.

Accordingly, we have yet to address and answer, in a precedential opinion, the question that DiGiacomo has brought before us. That is not the case outside this Circuit – two of our sister Courts of Appeals have already specifically examined and

analyzed the issue, reaching contrary conclusions. *Compare McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 153 (2d Cir. 2003) (holding that ERISA § 204 trumps a plan's break-in-service provisions that purport to limit the accrual of benefits arising from pre-ERISA employment) *with Jones v. UOP*, 16 F.3d 141, 143 (7th Cir. 1994) (refusing "to treat vesting and accrual of benefits differently with respect to breaks in service" and denying credit for pre-ERISA break-in-service time).[10] As such, the asymmetrical treatment of breaks-in-service in the statutory language of ERISA §§ 203 and 204, although explainable as the difference between vesting and accrual of benefits, has led to a division of two of our sister Courts of Appeals in their respective holdings. Not surprisingly, then, it has also led to a division in this Court, in which our dissenting colleague Judge Alito has concluded that § 203 should control this appeal. In this respect, Judge Alito has aligned himself with the result reached by the Seventh Circuit. *See Jones*, *infra*.

While we admit that this question is a close and difficult one, we hold, in accord with the Second Circuit, that the question posed at the outset of this opinion – "whether, for accrual of benefit purposes, ERISA prevents pension plans from denying credit for pre-ERISA service time accrued prior to a break-in-service" – is best answered by looking to the plain and unambiguous text of the benefit accrual section

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[10] See also Redmond v. Burlington N. R.R. Co. Pension Plan, 821 F.2d 461, 466-67 (8th Cir. 1987).

of ERISA (§ 204), as Congress has written it. Our answer is thus "yes," as that section requires that "all years of service" must be taken into account in calculating an employee's (DiGiacomo's) accrued benefit.

1.

In *Jones v. UOP*, the Seventh Circuit declined to treat vesting and accrual of benefits differently with respect to breaks-in-service, thus reading into § 204 (accrual of benefits) the exclusion clause of § 203 (vesting). 16 F.3d at 143 (Posner, J.). The *Jones* facts resemble those in this appeal in all essential respects, with one possibly significant exception, having to do with the likelihood of double recovery. *See* note 12 *infra*. Jones began service with UOP in 1949. He left work in 1960, returned to work in 1961, and continued working until retirement in 1985. UOP amended its plan (referred to in the opinion as the 1940 plan) in 1968 to base its benefits upon "credited past service." "Service" was defined as "an Employee's last continuous period of employment with the Employer." *Id.* at 142. By the time Jones retired, UOP had become a wholly owned subsidiary of Signal Company, and the UOP plan merged into the Signal Plan, which carried forward the same benefit structure. *Id.* at 142-143.

When Jones retired he was apparently entitled to two benefits: the much larger benefit based on the then-current Signal Plan, including all relevant years of service under the predecessor plan (the UOP plan), and a much smaller supplemental benefit attributable solely to his eleven years of

service from 1949 to 1960 under the former UOP plan. The latter benefit, which had vested, consisted of Jones' employee contributions plus interest to his date of retirement. At issue in the case was whether Jones was entitled to credited service for the eleven years of employment from 1949 to 1960 so as to increase the benefits to which he would be entitled under the successor plan (the Signal Plan). From a purely contractual standpoint, he was clearly not entitled to credit for that service under the plan's break-in-service provisions.

The Seventh Circuit began its analysis by observing that the only two cases to have considered the issue at that point read the exception for breaks-in-service found in § 203 as though the same language appeared in § 204, but that they did so without any analysis. *Id.* at 143 (citing *Redmond v. Burlington N. R.R. Co. Pension Plan*, 821 F.2d 461 (8th Cir. 1987); *Jameson v. Bethlehem Steel Corp.*, 634 F. Supp. 688 (E.D. Pa. 1986), *aff'd without opinion*, 802 F.2d 447 (3d Cir. 1986), *cert. denied*, 479 U.S. 1089 (1987)).[11] The Seventh Circuit noted that "it would be perilous to assume from the absence of an express reference to breaks in service that section 204(b)(1)(D) was intended to override them." *Id.* This is particularly so, the court opined, given that the "purpose of section 204 is to prevent the employer from defeating the vesting section, which immediately precedes it in the statute, by backloading benefits (that is, making benefits accrue very slowly until the employee is near retirement

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[11] *Jameson*, like *Haas & Cass*, *supra*, is not a precedential opinion in this Circuit. *See* 3d Cir. IOP § 5.7.

age)." *Id.* (citing Jeffrey D. Mamorsky, *Employee Benefits Handbook* § 18.16 (3d ed. 1992)). Inasmuch as "backloading" is a distinct problem from breaks-in-service, the Seventh Circuit concluded that, notwithstanding the absence of explicit statutory exclusion for pre-ERISA break-in-service provisions, "there is no indication that Congress in dealing expressly with the former problem in section 204(b)(1)(D) meant for the latter problem to be treated differently under section 204 than under section 203." *Id.* at 144.[12]

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[12] The Seventh Circuit initially took the view that the fact that Jones' rights (for the eleven years of service from 1949 to 1960) had vested under the 1940 plan was insignificant to the calculation concerning the credited service under the Signal Plan. But the fact that Jones was effectively seeking "double credits" for 1949 to 1960 played some part in Judge Posner's decision, although the extent of its significance is unclear:

> [Jones] is seeking, in effect, double credits for 1949 to 1960--the credit that he has already used to obtain a pension benefit under the 1940 plan and credit for the same years toward the pension he earned under the Signal Plan. There is nothing to suggest that section 204 was intended to confer such a windfall. That section should be read together with section 203 to protect the employee against efforts to circumvent section 203's vesting rules, rather than to defeat break in service provisions in plans adopted before ERISA was. There were no such efforts here.

Jones, 16 F.3d at 144. Here, of course, there is no issue concerning double credits or the likelihood of a windfall in favor of the beneficiary.

We note that in *McClain v. Retail Food Employers Joint Pension Plan*, 413 F.3d 582 (7th Cir. 2005), the Seventh Circuit recently reaffirmed its holding in *Jones*.

2.

In *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, the Second Circuit parted from the Seventh Circuit, declining to treat vesting and accrual of benefits the same with respect to breaks-in-service. 320 F.3d at 159. *McDonald*, like this case, involved a suit by a retiree who had suffered a breakin-service under a pension plan's pre-ERISA break-in-service rules. He alleged that the plan's calculation of accrued years of service violated ERISA. The Second Circuit, focusing solely upon the statutory language, concluded that § 204(b) is unambiguous: "had Congress intended to permit pre-ERISA break-in-service provisions to apply when calculating accrued benefits, it could have done so." *Id.* (citing ERISA § 203(b)(1)(F), 29 U.S.C. § 1053(b)(1)(F)). The court thus refused to look beyond the plain text of the statute, in holding that, under §§ 204(b) and 202(b), pre-ERISA break-in-service provisions, which would disregard or deny credit for such service, do not apply when calculating accrued benefits.[13]

C.

In *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129 (2005), the Supreme Court, although construing a different statute, employed the same

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[13] *Hoover v. Bank of America Corp.*, 286 F. Supp. 2d 1326 13 (M.D. Fla. 2003), has expressly followed *McDonald*. *Id.* at 1344 (finding the Second Circuit's decision in *McDonald* "more faithful to the canons of statutory construction and thus more persuasive").

principle we do today – "we must simply interpret the statute as written." *Id.* at 2135. Reading ERISA § 204 as it is written, we are persuaded that our position and that of the Second Circuit is more consistent with established canons of statutory construction than the Seventh Circuit's position.

Two canons of statutory construction particularly inform our analysis. The first is that a court must begin with the language of the statute. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citations omitted). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

With respect to the question presented here, the statutory language is unambiguous. ERISA § 204 establishes permissible accrual practices for pension plans. It makes no provision for break-in-service rules. Nor does it provide for disregarding pre-ERISA break-in-service time in calculating an employee's pension. Where Congress wanted to provide for break-inservice provisions in ERISA, it did so explicitly, as illustrated by § 203.

In view of Congress's failure to include a section in § 204 for accrued benefits which parallels the section found in § 203 for vesting, we rely on a second canon of statutory construction: "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537

(1994) (quoting *Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 338 (1994)). We are satisfied that none of the Fund's arguments are strong enough to overcome this presumption.

The Fund relies, as it must, on outside interpretive sources – *i.e.*, related statutory terms, applicable regulations, and relevant legislative history – in arguing that Congress intended to treat vesting and accrual of benefits the same with respect to breaks-in- service. The problem with such reliance, however, is that these sources are ambiguous at best, and therefore fail to evince clearly a congressional intent to give effect to break-in-service rules precluding an employee from receiving certain accrued benefits. In these circumstances, we venture no further than the statutory language in deciphering congressional intent.[14] As the Second Circuit noted, "ERISA is a complicated enough statute without the courts soldering new sections onto it." *McDonald*, 320 F.3d at 159.

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[14] Because, as we have stated, our decision is grounded in the plain and unambiguous text of § 204, we see no reason to further address secondary sources. For an exhaustive analysis of these sources, concluding that they demonstrate Congress's intent to treat vesting and accrual differently with regard to breaks-in-service, see *McDonald v. Pension Plan of NYSA-ILA Pension Trust Fund*, 153 F. Supp. 2d 268 (S.D.N.Y. 2001). For an analysis of some of the same sources reaching the opposite conclusion, see *Haas & Cass v. Boeing Co.*, Civ. A. No. 90-7414, 1992 WL 221335 (E.D. Pa. Sept. 4, 1992).

Finally, we cannot say that the difference in language enacted by Congress respecting vesting and accrual of benefits is "so bizarre that Congress could not have intended it." *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991) (internal quotation and citation omitted). Congress reasonably may have concluded, when it comes to the problem of *vesting*, that an employee, before he becomes entitled to pension or retirement benefits, should serve his employer continuously for the designated vesting period without departures or breaks-in-service. It is not clear to us that the same principle holds true for the accrual of an employee's benefits. Once an employee has become vested, Congress, by its explicit expression, has determined that all the benefits whenever accumulated by that employee, regardless of any discontinuity in service, should be included in his retirement rights. Such disparate treatment of vesting on the one hand and accrual on the other is neither irrational nor arbitrary, but could very well reflect Congress's motive in maximizing employee benefits once entitlement through vesting has been achieved. We have interpreted Congress's intent to that effect.

We recognize that there might also be sound policy reasons for reaching the *Jones* result, and the result advocated by Judge Alito. However, such reasons do not, in our view, overcome the plain language of the statute. Change in legislation is a task for Congress, and if our interpretation of what Congress has said so plainly is now disfavored, it is for Congress to cure. We do not sit here as a policy-making or legislative body.

III.

Accordingly, we will reverse the judgment of the District Court dated July 29, 2004, and we will remand to the District Court for further proceedings consistent with this opinion.

ALITO, Circuit Judge, dissenting:

I agree that the relevant provisions of ERISA speak in unambiguous terms, but I disagree with the majority about what they say. In my view, the majority misreads § 204 by equating the accrual of benefits with an unconditional right to receive benefits, even though benefits become unconditional through vesting, not accrual. Under the minimum vesting standards in § 203, the Plan was plainly allowed to treat benefits accrued prior to 1972 as forfeitable upon a break in service. Since I believe the plain text of the statute requires us to affirm the District Court's decision, I respectfully dissent.

I.

The majority quotes at length from ERISA §§ 202 and 204, but these sections of the Act are largely irrelevant to the appeal. DiGiacomo admits that the Fund properly credited him with accrued benefits. An exhibit attached to his complaint indicates that he accrued benefits pursuant to the terms of the Plan at a steady rate for each year of service prior to 1972. App. at 16. The notice also indicates, however, that these accrued benefits were "lost" as a result of his "break in service" that year. Id. Since DiGiacomo does not challenge the Fund's interpretation of the

Plan, the only question we must decide is whether the Fund could deny him benefits that accrued before ERISA applied to the Plan and that were forfeited under the terms of the Plan then in effect.

ERISA clearly answers this question in the affirmative. Section 203 provides that "for purposes of determining the nonforfeitable percentage" of an employee's "accrued benefit," a plan may permissibly disregard "years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date." 29 U.S.C. § 1053(a)(2), (b)(1)(F). The Plan in effect in 1972 was thus entitled to treat all benefits DiGiacomo had accrued prior to his break as "forfeitable" – that is, as conditional only. See ERISA § 3(19), 29 U.S.C. § 1002(19).

The Plan did just that. Although it provided for benefit accrual in each year of service, see App. at 20, it also provided that a break in service would result in the loss of prior vesting credit. See id. at 19. When DiGiacomo left covered employment in 1972, his benefits accordingly became forfeitable under § 203(b)(1)(F). Since the Plan further provided that accrued benefits would be forfeited upon a break in service, see App. at 20, DiGiacomo's departure from covered employment simultaneously resulted in the forfeitability and forfeiture of his benefits.[15]

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[15] The convergence of the conditions that led to the forfeitability and forfeiture of DiGiacomo's benefits illustrates why § 204 makes no mention of breaks in service. The majority ponders this omission, but a close reading of the statute reveals that § 203's break-in-service provisions would be superfluous in

Observing that ERISA's minimum standards for vesting and accrual differ, the majority concludes that "the Fund was required to credit DiGiacomo with 'all years of service' in computing his accrued pension benefits." Maj. Op. at [[9]]. The majority seems to assume that ERISA also required the Plan to include all of his accrued benefits in the calculation of his pension, but ERISA says nothing of the kind. As the Supreme Court explained in Central Laborers' Pension Fund v. Heinz, accrual is simply "the rate at which an employee earns benefits to put in his pension account." 541 U.S. 739, 749 (2004). Accrued benefits, in other words, are like chalk marks beside the employee's name. They are conditional rights that do not become "irrevocably his property" until they vest. Id. Only then do they become "legally enforceable against the plan." ERISA § 3(19), 29 U.S.C. § 1002(19). Prior to vesting, accrued benefits can be, and in this case were, forfeited under the terms of a participant's plan.

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§ 204. The loss of vesting credit as a result of a break in service under § 203(b)(1)(F) leaves a participant's pre-break accrued benefits forfeitable under the terms of his plan, but nothing in ERISA prevents a plan from making the break itself a forfeiture event. If a plan's pre-ERISA break-in-service provisions may disregard vesting credit earned prior to ERISA's effective date, it necessarily follows that the plan may call for the forfeiture of accrued benefits protected by that vesting credit.

DiGiacomo alleges that he became a fully vested participant after returning to covered employment,[16] but nothing in the Plan entitled him to restoration of his forfeited accrued benefits. ERISA certainly does not require their restoration. To the contrary, § 203 recognizes the enforceability of pre-ERISA break-in-service provisions as applied to benefits accrued prior to the Act's effective date. See Tanzillo v. Local Union 617, Int'l Bhd. of Teamsters, 769 F.2d 140, 145 (3d Cir. 1985). Under the Fund's unchallenged interpretation of the Plan, DiGiacomo was permanently stripped of any accrued benefits when his break in service occurred.

DiGiacomo's authorities to the contrary are unpersuasive. The Second Circuit in McDonald v. Pension Plan of the NYSAILA Pension Trust Fund concluded that the plain text of §§ 202 and 204 required a plan to provide for benefit accrual in every year of an employee's participation. See 320 F.3d 151, 156-57 (2d Cir. 2003); cf. 29 C.F.R. §

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[16] Although the complaint does not mention it, DiGiacomo's appellate brief appears to claim that some or all of his benefits had vested even prior to the break in service. See DiGiacomo's Br. at 16. This claim, if true, would not affect the analysis above. Regardless of how they were characterized under the 1972 version of the Plan, DiGiacomo's pre-break benefits were clearly "forfeitable" within the meaning of ERISA, since the Plan provided for their forfeiture if a break in service occurred. More to the point, ERISA did not require the Plan to treat them as nonforfeitable. Under § 203(b)(1)(F), the Plan could treat them as forfeitable if they accrued before ERISA applied to the Plan and were so treated under the version of the Plan then in effect. Because they were treated as forfeitable by the Plan in 1972, they could be forfeited upon the occurrence of any condition set forth therein, including a break in service.

2530.210(a)(2) (requiring qualified plans to take into account "all years of participation . . . for purposes of section 204"). This conclusion simply begs the question. The question is not whether benefits must accrue in every year of participation but whether benefits accrued in years prior to ERISA's effective date may be forfeited under break-in-service provisions then in effect. The answer supplied by § 203(b)(1)(F) is clearly affirmative.

II.

Although I agree that the Court's inquiry should begin and end with the statute's plain text, I note that the legislative history of §§ 203 and 204 confirms my interpretation. The reports on the embryonic legislation usually do not discuss accrual or, when they do, discuss it only under the rubric of vesting. See, e.g., S. Rep. No. 93-383, 1974 U.S.C.C.A.N. 4890, 4929, 4935-36; H.R. Conf. Rep. No. 93-1280, 1974 U.S.C.C.A.N. 5038, 5049, 5054-57; cf. S. Rep. No. 93-383, 1974 U.S.C.C.A.N. at 4890 (explaining, without reference to the concept of accrual, that the legislation was designed "to make sure that those who do participate in [retirement] plans do not lose their benefits as a result of unduly restrictive forfeiture provisions"); H.R. Rep. No. 93-807, 1974 U.S.C.C.A.N. 4670, 4671 (same).

Congress evidently understood accrual as simply the handmaiden to vesting. As the Senate report on S. 1179 explains, "[i]t is necessary to provide a statutory definition of an 'accrued benefit' because, unless this is a defined amount, vesting of an 'accrued benefit' in whatever form is specified by

the plan has little, if any, meaning." S. Rep. No. 93-383, 1974 U.S.C.C.A.N. at 4935; see also H.R. Conf. Rep. No. 93-1280, 1974 U.S.C.C.A.N. at 5055 (explaining that accrual standards are necessary to "limit the extent of 'back-loading' permitted under the plan"); Jones v. UOP, 16 F.3d 141, 143-44 (7th Cir. 1994) (same); 1 Jeffrey D. Mamorsky, Employee Benefits Handbook § 17:36 (2004) ("The minimum vesting standards of the Code would be rendered meaningless if the plan sponsor were free to backload the plan . . . because a mandated large percentage of nothing is still nothing.").

This history confirms that § 204 was not designed to afford any right to a guaranteed retirement benefit apart from the Act's minimum vesting standards. Under those minimum vesting standards, the Plan was entitled to treat DiGiacomo's benefits as forfeitable because they accrued before ERISA applied to the Plan and because they were so treated under the terms of the Plan then in effect. See § 203(b)(1)(F). Having permissibly deemed them forfeitable, the Plan could, and did, call for their forfeiture.

III.

Because ERISA provides DiGiacomo no right to receive the benefits that were forfeited under the Plan's break-in-service provisions in effect at the time the benefits accrued, his complaint fails to state a claim on which relief can be granted. The District Court correctly granted the Fund's motion to dismiss it. The majority errs in reversing that decision, and I respectfully dissent.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[ENTERED: NOVEMBER 15, 2005]

No. 04-3510

ALFRED DIGIACOMO,
Appellant,

v.

TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY,
Appellee.

Oa Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civil Action No. 04-1090)
District Judge; Honorable Legrome D. Davis

Before: SCIRICA, *Chief Judge,* ALITO* and
GARTH, *Circuit Judges*

(Opinion Filed: November 15, 2005)

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* Judge Alito did not participate in the conference resulting in this Opinion.

OPINION OF THE COURT
DENYING APPELLANT'S APPLICATION
FOR ATTORNEY'S FEES

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Garth, *Circuit Judge:*

Alfred DiGiacomo brought this action against the Teamsters Pension Trust Fund of Philadelphia and Vicinity (the "Fund") pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.*, alleging that the Fund incorrectly computed his pension benefits by refusing to credit pre-ERISA service time accrued prior to a break-in-service. The District Court granted the Fund's motion to dismiss on the ground that ERISA did not preclude the Fund from relying on certain break-in-service provisions in its governing pension plan. Those provisions explicitly permitted the Fund to exclude DiGiacomo's pre-

ERISA service time accrued prior to his break-in-service. A divided panel of this Court reversed, holding that Section 204 of ERISA, 29 U.S.C. §1054, trumped the plan's break-in-service provisions and thus required the Fund to aggregate DiGiacomo's pre-break and post-break service time in calculating his accrued benefit. *See DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity,* 420 F.3d 220 (3d Cir. 2005).[1]

We revisit this matter only to decide whether DiGiacomo, as the prevailing party, is entitled to attorney's fees under ERISA, 29 U.S.C. §1132(g)(l).[2] That provision provides that "the court *in its discretion* may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1) (emphasis added); *see also Ursic v. Bethlehem Mines,* 719 F.2d 670, 673 (3d Cir. 1983) (noting that 29 U.S.C. §1132(g)(1) "does not automatically mandate an award to a prevailing party") (citation omitted). We have set forth the following five factors to guide the exercise of such discretion:

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[1] The Court denied the Fund's Petition for Rehearing En Banc on October 5, 2005.

[2] DiGiacomo's counsel seeks $38,920.00 in attorney's fees for services rendered in successfully bringing an appeal from the District Court's dismissal of the action. We requested that the Fund respond to DiGiacomo's application for attorney's fees. On November 8, 2005, the Fund filed Appellees' Response in Opposition to Appellant's Application for Attorney's Fees, arguing that DiGiacomo has failed to satisfy the guidelines set forth in *Ursic v. Bethlehem Mines,* 719 F.2d 670 (3d Cir. 1983) for an award of attorney's fees.

> (1) the offending parties' culpability or bad faith;
> (2) the ability of the offending parties to satisfy an award of attorneys' fees;
> (3) the deterrent effect of an award of attorneys' fees against the offending parties;
> (4) the benefit conferred on members of the pension plan as a whole; and
> (5) the relative merits of the parties' position.

Ursic, 719 F.2d at 673.

We conclude that application of the *Ursic* factors does not support DiGiacomo's request for an award of attorney's fees. Our determination is particularly informed by the first and fifth *Ursic* factors. As we noted earlier in these proceedings, the question presented by this appeal - "whether, for accrual of benefit purposes, ERISA prevents pension plans from denying credit for pre-ERISA service time accrued prior to a break-in-service" - is a "close and difficult one." *DiGiacomo,* 420 F.3d at 225. The question has divided the Counts of Appeals. *Compare McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund,* 320 F.3d 151, 153 (2d Cir. 2003) *with Jones v. UOP,* 16 F.3d 141, 143 (7th. Cir. 1994) and *Redmond* v. *Burlington N. R.R, Co. Pension Plan,* 821 F.2d 461, 466-67 (8th Cir. 1987). And it has led to a division within our Court. See *DiGiacomo,* 420 F.3d at 223-231 (Alito, J., dissenting).

In view of this divergence of opinion regarding the proper construction of ERISA's break-in-service rules, it is clear to us that there was no culpability or

bad faith on the part of the Fund in partially denying DiGiacomo's claim for accrued benefits. It is equally clear to us that the Fund's legal position has significant merit. Leaving aside the supporting opinions from the federal appellate courts, the Fund prevailed before the Arbitrator and the District Court in the proceedings below. In addition, the Fund reasonably relied on past decisions from our Court in enforcing its pre-ERISA break-in-service provisions. *See Haas & Cass v. Boeing Co.*, Civ. A. No. 90-7414, 1992 WL 221335, at *4-*7 (E.D. Pa. Sept. 4, 1992), *aff'd without opinion,* 993 F.2d 877 (3d Cir. 1993); *see also Tanzillo* v. *Local Union 617, International Brotherhood of Teamsters,* 769 F.2d 140 (3d Cir. 1985). In these circumstances, we find no basis for a discretionary award of attorney's fees to the prevailing party.

Even assuming, without deciding, that the remaining *Ursic* factors weigh in favor of an award of attorney's fees, we believe that the first and fifth *Ursic* factors so strongly militate against such an award as to control our determination. Accordingly, we will deny DiGiacomo's application for attorney's fees.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-3510

ALFRED DIGIACOMO,

Appellant,

TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY,

Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civil Action No. 04-1090)
District Judge: Honorable Legrome D. Davis

Before: SCIRICA, *Chief Judge,* ALITO* and
GARTH, *Circuit Judges*

[ENTERED: NOVEMBER 15, 2005]

ORDER

This matter came to be heard on Appellant's application for attorney's fees pursuant to LAR Misc. 108.2. On consideration whereof, it is now here

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* Judge Alito did not participate in the conference resulting in this Order.

ORDERED and ADJUDGED that Appellant's Application for Attorney's Fees be, and the same is hereby DENIED.

All of the above in accordance with the opinion of this Court.

Attest:
/s/ Marcia M. Waldron
Clerk

Dated: November 15, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

ALFRED DIGIACOMO

v.

TEAMSTERS PENSION FUND OF
PHILADELPHIA AND VICINITY

CIVIL ACTION
NO. 04-1090

[ENTERED: JULY 29, 2004]

MEMORANDUM

DAVIS, J. July 29, 2004

Plaintiff Alfred DiGiacomo ("Plaintiff") brought this lawsuit against Defendant Teamsters Pension Fund of Philadelphia and Vicinity (the "Fund") under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., seeking to receive fall pension benefits under the Fund. The Fund now moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 4). For the reasons that follow, the Court grants the Fund's motion.

I. BACKGROUND

Plaintiff was a member of the Teamsters Union and a participant in the Fund. Between 1960 and 1971, he earned a total of ten and a half years of vesting service while working in covered employment.[1] For the next five years, between 1972 and 1977, Plaintiff worked outside covered employment and, thus, experienced a "Break in Service."[2] In 1978, Plaintiff returned to covered

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[1] Covered Employment "mean[s] any employment in a bargaining unit in a capacity for which Employer Contributions on behalf of an Employee are payable to the Trust Fund in accordance with the terms of a written collective bargaining agreement with the Union." Defendant's Memorandum in Support of Its Motion to Dismiss Plaintiff's Complaint ("Def.'s Mem."), Ex. A at 3. Covered Employment also includes "any employment with Union, the Trust Fund and the Teamsters Health and Welfare Fund of Philadelphia and Vicinity for which Employer Contributions on behalf of an Employee are payable to the Trust Fund." Id.

[2] The Break in Service rules applicable in this case are as follows:

> 1. For periods prior to January 1, 1976
>
> (a) Prior to first Covered Day - "An Employee shall be considered to have a Break in Service prior to his first Covered Day if his period of continuous employment with an employer who subsequently became a Covered Employer was broken for a period of 156 or more consecutive calendar weeks.
> (b) After first Covered Day - An Employee shall be considered to have a Creak in Service after his first Covered Day if he was not in Covered Employment for a period of 156 or more consecutive calendar weeks."

Def.'s Mem., Ex. A at 5.

employment, and between 1978 and 1999, he earned another eighteen years of vesting service.[3]

On February 4, 2000, Plaintiff applied to the Fund for pension benefits. The Fund Administrator approved Plaintiffs application on March 17, 2000, and credited him with eighteen years of vesting service and 16.78 years of contributory benefit service.[4] The Administrator determined that the vesting service Plaintiff earned between 1960 and 1971 was forfeited by reason of the Break in Service provisions of the Fund. See Def.'s Mem., Ex. A at 5 ("Years of Vesting Service shall be aggregated except that Vesting Service before an Employee's most recent Break in Service shall be forfeited.").

Plaintiff appealed the Administrator's determination, asserting that he was entitled to vesting service earned prior to his Break in Service. The Trustees, following a hearing, denied Plaintiffs appeal. The Trustees found that the "Fund's calculation of [Plaintiff]'s credited service, based on all available documentation was accurate, and the methods and procedures it used to verify his service were consistent with the procedures and methods used in all prior cases." Id., Ex. 3 at 3.

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[3] Due to the intermittent nature of Plaintiffs work, he did not earn vesting service in 1978, 1994-1997, and 2000.

[4] On April 24, 2003, the Fund provided Plaintiff with an updated statement of his benefits, reflecting additional credits he earned while working in covered employment in 2001 and 2002.

Plaintiff appealed the Trustees' decision to the American Arbitration Association. Arbitrator J. Joseph Loewenberg, following a hearing, denied Plaintiffs appeal. Arbitrator Loewenberg concluded that the Trustees did not act arbitrarily or capriciously in finding Plaintiff had incurred a break in service beginning in early 1972 and extending through 1978. Id., Ex. 4 at 6.

After exhausting his administrative remedies, Plaintiff filed the instant action against the Fund, alleging that it has incorrectly computed his pension benefits by failing to use the proper accrual method pursuant to 29 U.S.C. § 1054(b)(l)(D). (Dkt. No. 1). Essentially, Plaintiff argues that ERISA required the Fund to aggregate his pre-break and post-break service when determining his accrued benefit. Compl. ¶¶ 12, 13. The Fund contends that § 1054 does not override a pre-ERISA plan's break in service provisions, such as those in the Fund, which, by its terms, precludes Plaintiff from receiving credit for his service between 1972 and 1977. Def.'s Mem. 6-9.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the complaint. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In considering a motion to dismiss, the court must accept as true all factual allegations of the complaint and draw all reasonable inferences in the light most favorable to the plaintiff. Board of Trs. of

Bricklayers and Allied Craftsmen Local 6 of N.J. v. Wettlin Assoc. Inc., 237 F.3d 270, 272 (3d Cir. 2001). A court will grant a motion to dismiss only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. Ramadan v. Chase Manhattan Corp., 229 F.3d 194, 195-96 (3d Cir. 2000) (citing Alexander v. Whitman, 114 F.3d 1392, 1398 (3d Cir. 1997)).

III. ANALYSIS

This case is nearly identical to a case in which the Third Circuit affirmed Judge Hutton's determination on the precise issue presented here: whether ERISA permits the Fund, in calculating a vested employee's accrued benefit, to exclude years of service based on its pre-ERISA break in service provisions. See Haas and Cass v. Boeing Co., Civ. A. No. 90-7414, 1992 WL 221335, at *4-*7 (E.D. Pa. Sept. 4, 1992), affd, 993 F.2d 877 (3d Cir. 1993); see also Tanzillo v. Local Union 617, 769 F.2d 140, 145 (3d Cir. 1985) (noting ERISA recognizes break in service forfeiture of those credits which had been accrued prior to the effective date of ERISA, if such break in service forfeiture is provided for in the applicable plan document); Jameson v. Bethlehem Steel Corp., 634 F. Supp. 688, 691-92 (E.D. Pa. 1986) (applying 29 U.S.C. § 1503 to the plaintiffs claim that his pre-break service was nonforteitable), affd, 802 F.2d 447 (3d Cir. 1986). In Haas, the plaintiffs argued that this issue is governed not by 29 U.S.C. §

1503,[5] but by 29 U.S.C. § 1504, which requires an employer, in calculating a vested employee's accrued benefit, to count the employee's years of service, and does not mention breaks in service. After "reviewing ERJSA, 29 U.S.C. §§ 1052-54, the relevant legislative history, the Department of Labor's promulgated regulations, and recent cases addressing ERISA accruals," Judge Hutton rejected plaintiffs' argument and concluded that § 1054(b)(l)(D) does not require employers to credit pre-ERISA service if such service is disregarded under the applicable plan's break in service rules. Haas, 1992 WL 221335, at *5-*7 ("[I]t is the pre-ERISA pension plan, and not § 1054, that defines the amount of benefit, if any that a participating employee is entitled to receive."). Judge Hutton found that the purpose of 29 U.S.C. § 1054 is to prevent the employer from backloading benefits. Id. at *5.

Similarly, in Jones v. UOP, 16 F.3d 141, 143-44 (7th Cir. 1994), the Seventh Circuit declined to hold that 29 U.S.C. § 1054 (b)(l)(D) was intended to override a pre-ERISA plan's break in service provisions, hi that case, the court found that the plaintiff was not entitled to credit for service prior to a break in service, where the pre-ERISA provisions of the plan defined "service" as "an Employee's last continuous period of employment with the Employer." Id. at 142-43. Considering the provisions

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[5] 29 U.S.C. § 1503 permits a plan to exclude, for vesting purposes, years of service that would have been disregarding under a pre-ERISA plan's break in service provisions. See 29 U.S.C. § 1503(b)(l)(F).

of §§ 1053 and 1054 together, the court declined to conclude from the presence of an express provision permitting application of pre-ERISA break in service rules in § 1053(b)(l)(F) (vesting) and the absence of any similar reference to breaks in service in § 1054(b)(l)(D) (accrual of benefits), that Congress intended to override such provisions. Id. at 143-44. Like Judge Hutton, the court found that "the evil" at which § 1054 was directed is backloading. Id. (citing Jeffrey D. Mamorsky, *Employee Benefits Handbook* § 18.16 (3d ed. 1992)). In the Seventh Circuit's view, "it would be perilous to assume from the absence of an express reference to breaks m service that [§ 1054](b)(l)(D) was intended to override them," because the provision was intended to deal with the distinct problem of backloading. Id. Thus, the court concluded § 1053(b)(l)(F), which permits plans to exclude, for vesting purposes, years of service that would have been disregarded under a pre-ERlSA plan's break in service rules, is applicable in determining the accrued benefit under § 1054(b)(l)(D). Id.; see also Redmond v. Burlington N. R.R. Co. Pension Plan, 821 F.2d 461 (8th Cir. 1987) (reading the exception in 29 U.S.C. § 1053(b)(l)(F) into 29 U.S.C. § 1054).

In this case, Plaintiff makes the same argument that was raised and rejected in Haas- namely that 29 U.S.C § 1053(b)(l)(F), which permits a plan to apply its pre-ERISA break in service rales, does not apply when determining the accrued benefit

of a vested employee under 29 U.S.C. § 1054.[6] Haas, 1992 WL 221335, at *4-*5. Judge Hutton held that 29 U.S.C. § 1053(b)(l)(F) is applicable to accrued benefit calculations under 29 U.S.C. § 1054(b)(l)(D): "While the Court fully understands the distinction in the plaintiffs' position, that § 1053 addresses vesting and § 1054 details benefit accrual, the Court nevertheless concludes that Congress intended that

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[6] Plaintiff relies on McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund, 153 F. Supp. 2d 268 (S.D.N.Y: 2001), aff'd, 320 F.3d 151 (2d Cir. 2003), which holds that 29 U.S.C. §§ 1054(b)and 1052(b) override a plan's break in service provisions that limit the accrual of benefits arising from pre-ERISA employment. In McDonald, the district court found that the plan administrators improperly used the plan's pre-ERISA break in service provision to disregard years of service earned prior to a break in service and to limit the plaintiff's accrued benefits. McDonald, 153 F. Supp. 2d at 28l. The court held that although § 1053(b) explicitly allows the application of pre-ERISA break in service provisions when calculating vested benefits arising from pre-ERISA service, there is no such provision in § 1054 with respect to accrued benefits. Id. Therefore, under §§ 1054(b) and 1052(b), pre-ERISA break in service provisions do not apply when calculating accrued benefits, and, with certain exceptions, all years of service are included. Id. The court reasoned that, had Congress intended for pre-ERISA break in service provisions to apply when calculating accrued benefits, it would have included a provision to that effect in section § 1052(b) as it did in section 203(b)(l). Id. The Second Circuit affirmed this aspect of the district court's holding and reasoning, and declined to follow the Seventh, Third, and Eighth Circuits' refusal to treat vesting and accrual of benefits differently with respect to breaks in service, gee McDonald, 320 F.3d at 156-59. To date, only one court outside the Second Circuit has followed the McDonald decision. See Hoover v. Bank of Am. Corp., 286 F. Supp. 2d 1326, 1342 (M.D. Fla. 2003).

a uniform standard apply to both provisions." Id. at *5. Again, the Third Circuit affirmed this ruling. See 993 F.2d 877.

Accordingly, the Fund's motion will be granted. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALFRED DIGIACOMO

v.

TEAMSTERS PENSION FUND OF PHILADELPHIA AND VICINITY

[ENTERED: JULY 29, 2004]

CIVIL ACTION
NO. 04-1090

ORDER

AND NOW, this 29th day of July, 2004, upon consideration of Defendant Teamsters Pension Fund of Philadelphia and Vicinity's Motion to Dismiss (Dkt. No. 4), and Plaintiff Alfred DiGiacomo response thereto, consistent with the accompanying memorandum, IT IS HEREBY ORDERED that said Motion is GRANTED. IT IS HEREBY FURTHER ORDERED that Defendant's request for reasonable attorneys' fees and costs pursuant to Federal Rule of Civil Procedure 11 is DENIED.

BY THE COURT:

/s/ Legrome D. Davis
LEGROME D. DAVIS, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[ENTERED: OCTOBER 5, 2005]

No. 04-3510

ALFRED DIGIACOMO,
Appellant,

v.

TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY,
Appellee.

Present: SCIRICA, Chief Judge, SLOVITER, AUTO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN and GARTH*

PETITION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellee having been submitted to all the available circuit judges in regular active service, and a majority of the circuit judges in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing is DENIED.

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* Senior Judge Garth, who sat on the original panel, is limited to panel vote only.

By the Court

/s/ Leonard I. Garth,
Circuit Judge

Dated: October 5,2005
par/cc: D.J.D.,Esq.
S.A.M., Esq.

In the Matter of Arbitration between

TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY

- and -

ALFRED P. DIGIACOMO

[ENTERED: NOVEMBER 1, 2001]

AAA NO. 14 320 00728 01

Claim Denial Appeal

The hearing in this matter was held on October 17, 2001 in the Philadelphia offices of the American Arbitration Association. The hearing was a consequence of Mr. DiGiacomo's appeal of the: Opinion of Trustees of the Teamsters Health and "Welfare Fund of Philadelphia & Vicinity (Joint Exhibit 3). Representing the Teamsters Pension Trust Fund of Philadelphia & Vicinity was Neal Goldstein, Esq. Mr. DiGiacomo represented himself at the hearing. Also attending was William J. Einhorn, Esq., Administrator of the Pension Plan.

Background

Mr. DiGiacomo was a participant in the pension plan, and submitted an application for benefits on February 4, 2000. The Administrator of the Pension Plan determined that Mr. DiGiacomo was credited with 16.78 years of benefit service from 1979 through 1999, hut not credited with over ten

years of benefit service from 1961 through 1971 (Joint Exhibit 5, p. 14). Mr. DiGiacomo appealed the determination of the Administrator of the Pension Plan (Joint Exhibit 5, p. 8).

Article V, Section I of the Pension Plan (Joint Exhibit 1) sets forth the appeals procedure in case a participant of the plan objects to a decision of the Trustees regarding eligibility for benefits, amount of benefits, or suspension of benefits. The first step of the appeals procedure is a hearing before a Hearing Panel, which occurred on February 14, 2001 (Joint Exhibit 4). The Trustees' decision on the appeal, issued on April 2, 2001, upheld the initial determination of the Administrator (Joint Exhibit 3). The second step of the appeals procedure is a hearing before an impartial arbitrator. Mr. DiGiacomo requested a hearing at this step on January 10, 2001 (Joint Exhibit 5, p. 7). The American Arbitration Association notified J. Joseph Loewenberg on June 4, 2001 that he would be the arbitrator in this matter.

Discussion

It is important to note at the outset that this, appeal hearing was conducted by the authority granted in the Teamsters Pension Plan of Philadelphia & Vicinity (Joint Exhibit 1). The arbitration provision allows a review of the decision of the Trustees at the first step of the appeals process. Article V, Section I of the Plan limits the authority of the arbitrator to answering three questions:

1. Were the Trustees in error upon an issue of law?

2. Did the Trustees act arbitrarily oi capriciously in the exercise of their discretion?

3. Were the Trustees' findings of feet supported by substantial evidence?

Mr. DiGiacomo presented three decisions of the U.S. Court of Appeals for the Third Circuit to support the allegation that the Trustees had committed an error of law. In IUE v. Skinner Engine (Docket 98-3461, filed August 10, 1999) the court wrote in its decision, "To vest benefits is to render them forever unalterable." Mr. DiGiacomo contended that his pension benefits were vested after ten years of Vesting Service and hence could not be changed or subject to forfeiture. In passing, one may note that the court upheld the Company's retroactive elimination or modification of medical and life insurance benefits of employees who retired before the 1993 collective bargaining agreement went into effect. Unlike the situation in IUE v. Skinner Engine, however, the Trustees of the Plan did not change rules or benefits retroactively. On the contrary, the rules were changed to deal with future conditions. The rules in effect when the break in service occurred were the rules applied to Mr. DiGiacomo's situation.

In Bellas v. CBS (Docket 99-3775, filed August 14, 2000), the issue was whether job separation benefits contained in a Westinghouse Pension Plan

were protected by provisions of the Employee Retirement Income Security Act of 1974 (ERISA). The company had first narrowed and then eliminated Special Retirement provisions of the plan in a manner that adversely affected Mr. Bellas, who lost his job through not fault of his own. The issue raised by Mr. DiGiacomo did not relate to his eligibility to receive pension benefits under the Teamsters Pension Plan. Mr. DiGiacomo took exception to the loss of time prior to the break in service, during which contributions were made to the plan. The break-in-service rule applicable to Mr. DiGiacomo's situation, both as to the calculation of a break in service and the impact of such break on accumulated benefits, was in place prior to the effective date of ERISA and hence was not subject to its protection.

In Harte v. Bethlehem Steel (Docket 98-2052, filed February 29, 2000), Mr. Harte protested the company awarding him a lower pension because of a shortfall in service. He claimed the definition of compensable injury was ambiguous and reasonably subject to various interpretations, including, one that would allow him to qualify for a higher pension amount. The issue before the court was whether ERISA required the plan administrator to notify an employee of a break in service when provisions of a plan were ambiguous. Mr. DiGiacomo contended that the Administrator of the Plan had not notified him of any impending break in service; had he been notified, he could have taken steps to protect his pension rights. Unlike the cited court case, the definition of break in service prior to January 1, 1976 and the attendant example in the Summary

Plan Description do not appear to be ambiguous so that reasonable persons might interpret it differently (Joint Exhibit 2, pp. 13-14). Moreover, as in the previously cited case, the objected-to provision and definition were in effect prior to the effective date of ERISA.

The three court decisions cited by Mr. DiGiacomo were filed in 1999 or 2000, and the plan provisions and administration were subject to ERISA standards. The implementation of ERISA unquestionably changed the rules of pension plans and the administration of those plans. The current Teamsters Pension Plan reflects the impact of ERISA. It is not possible, however, to apply post-ERISA revisions in the plan or court decisions relying on ERISA provisions to an earlier time period. Hence, the court decisions presented by Mr. DiGiacomo to demonstrate that the Trustees had committed errors on issue of law fail to support the contention.

Mr. DiGiacomo introduced another court decision to show that the Trustees acted arbitrarily and/or capriciously. In Palladino v. Palladino (Pa. Super, filed June 30, 1998, 713 A.2d 676), Mr. Palladino first became a participant in the Teamsters Pension Trust Fund of Philadelphia & Vicinity in 1958 and retired in 1992. Although he had a break in service between 1980 and 1984, the Trustees reduced Mr. Palladino's years of benefit service by the length of the break in service. Mr. DiGiacomo felt the Trustees should compute his break in service in identical fashion. The difference in the two cases is the tuning of the break in service.

Mr. Palladino's break in service occurred after January 1, 1976 so that, by the Plan's terms, it was subject to a different set of rules than Mr. DiGiacomo's break in service which occurred prior to that date. As noted above, the change in rules was necessitated by the provisions of ERISA. As long as everyone who incurred a break in service was treated similarly according to the rules of the Plan in effect at the time of the break in service, the Trustees cannot he found to have acted arbitrarily or capriciously. Only if the Trustees had treated differently breaks in service occurring under rules in effect at the time would the charge be valid. Since no evidence was entered to that effect, the charge cannot be upheld.

Aside from court decisions, Mr. DiGiacomo cited errors by the office of the Administrator of the Plan in the spelling of his name, his wife's maiden name, his age, and dates on letters addressed to him. Moreover, during the course of processing his claim, the Administrator credited him with additional days of service for 1967, 1969, 1970 and 1971 that had not appeared initially (Joint Exhibit 5, pp. 3-4). These errors and corrections exemplified inexact record-keeping to Mr. DiGiacomo. Clerical sloppiness in spelling does not automatically translate to errors in tracking work history. The fact the Plan checked Social Security Administration records and, if warranted, made changes in its initial determination suggest its willingness and readiness to make corrections when provided with additional evidence. Such action cannot be held to be capricious or arbitrary.

Mr. DiGiacomo declared a break in service applies to those withdrawing from the industry. He never took a withdrawal from the union in 42 years. Accordingly, the Plan had no cause to declare he had incurred a break in service. The definition of "break in service" has no direct relationship to union membership or even working in the industry. Instead, it is a function of a specified length of time during which no Covered Employer makes a contribution to the Pension Fund. Prior to January 1, 1976, the length of time was 156 or more consecutive calendar weeks. The Trustees did not act arbitrarily or capriciously in finding Mr. DiGiacomo had incurred a break in service at the end of the first quarter of 1975.

The final grounds for reviewing the decision of the Trustees is to determine whether the findings of feet were supported by substantial evidence. Fiduciary responsibility on the part of the Plan demands proof of claims for Benefit Service. As noted above, the Plan made credit adjustments for the years of 1967 through 1971 as a result of Social Security Administration records. Mr. DiGiacomo maintained the Plan's records still contained errors, For instance, he never worked for "West Jersey Health System (Joint Exhibit 5, p. 14) Moreover, his earnings for 1960 suggest he worked more days than he was given credit for. It is not necessary to rule on these items because they do not relate to the crucial time period, namely the period following the second quarter of 1972. Mr. DiGiacomo asserted he had worked during the period in which he bad been charged with a break in service, and in case of White-Turner, with a company which had previously

made benefit contributions in his name. Mr. DiGiacomo could not furnish any evidence of work during the break in service, and the Administrator of the Plan could find no evidence of such work, let alone work for a Covered Employer. The Social Security Administration records contain not a single instance of employment earnings in the critical time period. It is difficult to believe that Whiting Turner, which had submitted his earnings for three consecutive years, would suddenly fail to furnish the Social Security Administration with employee earnings. Despite encouragement at every step of the process, Mr. DiGiacomo was unable to supply any evidence to bolster his contentions. Hence, the Trustees' finding of a break in service was based on the only evidence available.

The Opinion of the Trustees denied Mr. DiGiacomo's appeal and upheld the Administrator's determination of Mr. DiGiacomo's break in service that canceled his previous Vesting and Benefit Service. In reviewing the Opinion and the record on which it was based, the arbitrator finds no grounds for finding an exception to the Trustees' Opinion.

Award

The appeal of Mr. DiGiacomo is denied.

/s/ J. Joseph Loewenberg
J. Joseph Loewenberg

Arbitrator

November 1, 2001

TEAMSTERS HEALTH AND WELFARE FUND OF PHILADELPHIA & VICINITY

APPEAL OF ALFRED DIGIACOMO

OPINION OF TRUSTEES

This case involves an appeal by Alfred DiGiacomo from the Fund's calculation of his monthly benefit. At issue in this case is the Fund administration's application of the Break In Service provisions of the Plan.[1]

Mr. DiGiacomo submitted his application for pension benefits on February 4, 2000. His application was approved on March 17, 2000.[2] The Fund's file reflected that Mr. DiGiacomo first entered Covered Employment in 1960. He was credited with sufficient days "to earn benefit service credit beginning in 1961 through 1971, earning either a full or half year benefit service credit in each of those years. (D.R. at p. 5 and Appeal Packet at p. 4). Thereafter, according to the Fund's records, Mr. DiGiacomo left Covered Employment in 1972 and did not return until some time in 1978. From 1979 through 1993, Mr. DiGiacomo earned benefit service in Covered Employment as detailed in the Appeal Packet document referred to previously. (Id.). Based on the documentation reviewed by Fund administration, DiGiacomo was credited with 16.78

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[1] Teamsters Pension Plan of Philadelphia & Vicinity, Amended and Restated effective June, 1997, at Article I, Section R.

[2] Appeal Packet at pp. 9-13.

years of contributory benefit service. The first 10 1/2 years of his service in Covered Employment was forfeited by reason of the Break In Service provisions of the Plan. (D.R. at p. 5).

The Break In Service rules applicable in this case appear at Article I, Section R and provide as follows:

> 1. For periods prior to January 1, 1976
>
> (a) Prior to first Covered Day - An employee shall be considered to have a Break In Service prior to his first Covered Day if his period of continuous employment with an employer who subsequently became a Covered Employer was broken for a period of 156 or more consecutive calendar weeks.
>
> (b) After first Covered Day - An employee shall be considered to have a Break In Service after his first Covered Day if he was not in Covered Employment for a period of 156 or more consecutive calendar weeks.

The Fund's review of available documentation, including the report obtained from the Social Security Administration reveals that torn the period beginning in early 1972 and extending through 1978,

Mr. DiGiacomo did not work in Covered Employment.[3] In light of the documents, therefore, and in accordance with the Break In Service rules applicable for those years, Mr. DiGiacomo's service prior to 1972, was forfeited under the Plan provision referred to above.

In support of his appeal, Mr. DiGiacomo advanced the following positions:

1. The Plan document is ambiguous with respect to the various Break In Service rules, therefore, he should be entitled to a more liberal interpretation of the rules in this appeal. (D.R. at pp. 6-10);

2. The Fund's interpretation of the Break In Service rules in Mr. DiGiacomo's case, as compared to the manner in which the Break In Service rules were applied in the Paladino case, reflect that Mr. DiGiacomo has been held to a "different standard." (D.R. at pp. 10-11);

3. The Fund administration did not accurately credit him with Covered Employment with Whiting Turner from 1969 through 1973 when he worked on the Betsy Ross Bridge construction project. (D.R. at pp. 12-13); and

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[3] According to documents obtained from Social Security Administration, Mr. DiGiacomo only worked 22 days in Covered Employment during the first quarter of 1972 and did not work in Covered Employment again until 1978. (Appeal Packet at pp. 27-28).

4. In accordance with the Trustees' discretion, to consider extenuating circumstances, viz., in this instance, reduced business activities and limited work opportunities, the Trustees should exercise their discretion and override the Break In Service rules. (D.R. at p. 16).

We have carefully considered and evaluated each of the arguments advanced by Mr. DiGiacomo in this appeal. We find, however, for the reasons discussed in detail below, that the Fund's determination of Mr. DiGiacomo's benefit service was accurate, it is consistent with the evidence presented, and it is required by the express provisions of the Plan. In light of the foregoing, we must deny the instant appeal.

With respect to the Fund's determination that Mr. DiGiacomo suffered a Break In Service between 1972 and 1976, the documents available to the Fund, including the itemized statement the Fund received from the Social Security Administration, establish that Mr. DiGiacomo did not work a sufficient time in Covered Employment during any of the years in question adequate to overcome the Break In Service rules applicable at that time. (Appeal Packet at pp. 4; 14; 17; 26-31). Unfortunately, Mr. DiGiacomo does not have any documents, such as pay stubs, tax returns, etc., which support his claim that during a portion of that period, viz., 1971 through 1973, he was employed by Whiting Turner on the Betsy Ross Bridge construction project. (D.R. at pp. 12-13). We find, that the Fund's calculation of Mr. DiGiacomo's credited service, based on all of the available documentation was accurate, and the methods and

procedures it used to verify Ms service were consistent with the procedures and methods used in all prior cases. In the absence of any documentation provided by Mr. DiGiacomo which contradicts the Fund's calculation and/or which supports Mr. DiGiacomo's recollection of his employment activities during the early 1970s, we have no basis to set aside the Fund administration's calculations.

With respect to Mr. DiGiacomo's claim that the Plan documents' description and explanation of the Break In Service rules are ambiguous in some manner, once again, we find that the Plan documents are clear and unambiguous, and expressly provide for a forfeiture in this case. In that regard, the Plan expressly sets forth the different Break In Service rules, which apply for specific time periods, in this instance, for service acquired during periods prior to January 1, 1976. While we appreciate and understand Mr. DiGiacomo's arguments with respect to the more liberal Break In Service rules which became applicable when Congress enacted ERISA, Mr. DiGiacomo's Break In Service occurred prior to 1976, and therefore, we are constrained to apply the Break: In Service rules applicable during that period of time. We have carefully renewed the language of the SPD to which Mr. DiGiacomo referred. We do not agree with Mr. DiGiacomo's contention that the language utilized in the Summary Plan Description is ambiguous with respect to the Break In Service rules at issue. Moreover, the specific example provided in the Summary Plan Description expressly establishes the application of the pertinent Break In Service rule that applies in this case. (D.R. at pp. 8-10).

With respect to Mr. DiGiacomo's claim that application of the Break In Service rules in this case, as compared to the Paladino decision represent a different standard, and/or disparate treatment, we disagree. Mr. DiGiacomo's reliance upon the facts recited in a Pennsylvania Superior Court decision do not provide the Trustees with a rational basis upon which to consider this argument. To the extent that the Superior Court decision can be considered a reliable comparison, however, based on the documents provided us, the Break In Service rule that was applicable in the Paladino decision was post-ERISA, and therefore, does not support Mr. DiGiacomo's argument in the instant appeal.

Finally, with respect to Mr. DiGiacomo's contention that his case presents special extenuating circumstances which warrant the Trustees' non-application of the express language of the Plan, we are constrained to find, based on the facts and evidence of record that we are obligated as fiduciaries to apply the Plan fairly and consistently and in accordance with the express provisions thereof. In light of all the foregoing, we deny Mr. DiGiacomo's appeal.

In concluding, we direct Mr. DiGiacomo to the following language in the Pension Plan:

> Any participant or Beneficiary of a participant who applies for benefits under this Pension Plan and is ruled ineligible by the Trustees (or by an administrator acting for the Trustees), or who believes he did not receive the full amount of benefits to which she is

entitled, or whose benefits are suspended upon reemployment pursuant to Section F of Article IV, or who is otherwise adversely affected by any action of the Trustees, shall have the right to request the Board of Trustees to designate a. Hearing Panel (to be composed of at least two Trustees) to conduct a hearing in the matter, provided that he makes such a request, in writing within 60 days after being appraised of, or learning of, the Board's action.

The Hearing Panel shall then conduct a hearing, at which the participant or Beneficiary shall be entitled to present his position and any evidence in support thereof, The participant or Beneficiary may be represented at any such hearing by an attorney or by any other representative of his choosing. Thereafter, the Trustees shall issue a written decision reaffirming, modifying, or setting aside their former action.

In exercising their duties, the Trustees the Administrator, or any person properly exercising authority delegated by the Trustees or Administrator, shall have the fullest degree of discretion allowed by law in determining eligibility for benefits and in construing the terms of this Plan and related documents.

If the participant or Beneficiary is dissatisfied with the written decision of the Trustees, he shall have the right to appeal the matter to arbitration in accordance with the

Voluntary Labor Arbitration Rules of the American Arbitration Association, provided that he submitted a request for arbitration to the Board of Trustees, in writing, within sixty (60) days of receipt of the Trustee's written decision.

The question for the arbitrator shall be whether in the particular instance, the Trustees (1) were in error upon an issue of law, (2) acted arbitrarily or capriciously in the exercise of their discretion or (3) whether their findings of fact were supported by substantial evidence.

The administration fees of the American Arbitration Association shall be borne equally by the appealing party, and the arbitrator's fee and expenses shall also be borne equally, unless the arbitrator, in his award, should assess such expenses against either of the parties. The arbitrator shall have the authority to assess such fees and expenses against the Fund if the appealing party's claim is not frivolous. The decision of the arbitrator shall be final and binding upon the Trustees and upon the appealing party. The procedures specified in this section shall be the sole and exclusive procedures available to a participant or beneficiary of a participant who is dissatisfied with an eligibility determination, or benefit award, or who is otherwise adversely affected by any action of the Trustees.

/s/ Thomas Hummel
Thomas Hummel, Trustee

/s/ Arnold S. Rosenthal
Arnold S. Rosenthal, Trustee

Dated: 4/2/01